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In the Supreme Court of the United States

October Term, 1940

No. 502

WILLIS COX,
WALTER CHAPLINSKY,
JOHN KONIDES, et al.,
Appellants

vs.

THE STATE OF NEW HAMPSHIRE
Appellee

APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

APPELLEE'S BRIEF

FRANK R. KENISON,
Attorney General
J. VINCENT BRODERICK,
County Solicitor

State House
Concord, N. H.

Attorneys for Appellee

Jeremy R. Waldron
of Counsel

The Concord Press, Concord, N. H.

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OPINION BELOW

The Opinion of the New Hampshire Supreme Court is not yet officially published and reported but is unofficially reported in 16 A. (2d) 508 (R. 238-251 inc.).

JURISDICTION.

Jurisdiction of the Supreme Court of the United States has been invoked, under section 237 (a) of the Judicial Code [28 U.S.C. 344 (a)].

THE STATUTE.

The statute which is drawn in question by the appellants is found in Public Laws of the State of New Hampshire, chapter 145, sections 2, 3, 4 and 5 and reads as follows:

"2. Theatricals; Parades; Meetings. No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee for cities hereinafter provided for.

"3. Licensing Board. Any city may create a licensing board to consist of the person who is the active head of the police department, the mayor of such city and one other person who shall be appointed by the city government, which board shall have delegated powers to investigate and decide the question of granting licenses under this chapter, and it may grant revocable blanket licenses to fraternal and other like organizations, to theatres and to undertakers.

"4. Licenses; Fees. Every such special license shall be in writing, and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open-air public meeting. Every licensee shall pay in advance for such license, for the use of the city or town, a sum not more than three hundred dollars for each day such licensee shall perform or exhibit, or such parade, procession or open-air public meeting shall take place; but the fee for a license to exhibit in any hall shall not exceed fifty dollars.

"5. Penalty. If any person shall violate the provisions of the preceding sections he shall be fined not

more than five hundred dollars; and it shall be the duty of the selectmen to prosecute for every violation of this chapter."

The New Hampshire Supreme Court held that the statute was constitutional and valid "under the federal as well as under the state constitution." (R. 251).

STATEMENT OF THE CASE.

The following statement of the case is taken from the opinon of the Supreme Court of the State of New Hampshire in *State* v. *Cox,* 90 N. H.——, 16 A. (2d) 508, (decided June 20, 1940):

"Complaints, for taking part in parade or procession on public streets in the City of Manchester without license therefor as required by Statute (P. L., c. 145, s. 2), the violation of which is made a misdemeanor (Ib., s. 5). The defendants were first found guilty by the Municipal Court of Manchester, and again, on appeal, by a jury in the Superior Court.

"The defendants are believers in a form of Christianity they regard as opposed to religion. They are connected with a directing organization and call themselves Jehovah's witnesses and ordained ministers to preach the Gospel according to their views of Christianity.

"On Saturday, July 8, 1939, early in the evening they met with 83 others at a hall in Manchester for the purpose of engaging in a demonstration called by them an 'information march.' They divided into groups of from 15 to 20 persons, each group proceeding to an assigned part of the business district of the city, and thence in single-file formation and 'as close together

as it was possible for them to get without interfering with each other's walking' marched on the sidewalks of certain streets, some carrying placards (fol. 237) or signs. The defendants carried signs fastened to a short staff and bearing the sentence Religion is a Snare and a Racket on one side and on the other an exhortation Serve God and Christ the King. Leaflets were also distributed by them while marching.

"Manchester had a population of over 75000 in 1930, and there was testimony that on Saturday nights in an hour's time 26000 persons passed one of the intersections where the defendants marched. The marchers interfered with the normal sidewalk travel, but no technical breach of the peace occurred.

"The march was a prearranged affair, and no permit for it was sought, although the defendants understood that under the statute one was required.

"Their bill of exceptions was allowed. It presents as legal issues the construction of the statute and its validity under the state and federal constitutions." (R. 238-251 inc.)

The appellants' statement (Appellants' Brief 5, 6) that neither vehicular or pedestrian traffic was blocked does not present an accurate picture of the situation. The record shows that traffic on the sidewalks and streets of the city of Manchester where the appellants held their parade, or procession, on the evening of July 8, 1939 was "heavy" (R. 9, 33, 37, 48) and "very heavy." (R. 6, 50, 55, 119). Furthermore, there was evidence that some time during the parade the appellants were in the middle of Elm Street, a public highway in the city and "when they turned, they interfered with people traveling in both directions and they had to stop and let them by." (R. 47). The evidence

clearly demonstrated that there was "interference with the travel of the public, the public walking." (R. 47). Although there may not have been any technical breach of the peace as a result of the parade, "the pedestrians stepped to one side." (R. 68).

Although the appellants contend that the marchers in the parade were fifteen to twenty feet apart, the evidence was clear that the marchers were "as close together as it was possible for them to get without interfering with each others walking." (R. 239). The weight of the evidence supported the contention of the appellee that the marchers were as close together as it was possible for them to walk. (R. 40, 42, 52, 53). The appellants state in their brief that "this dispute is not material to any of the issues in this case and will not be discussed further." (Appellants' Brief p. 6).

The appellants took the position that they were going to parade without a permit even though they knew one was required by law. (R. 51, 239).

SUMMARY OF ARGUMENT.

It is the position of the appellee that the statute in question does not deprive the appellants of their civil liberties under Section 1, Fourteenth Amendment, United States Constitution. The appellants' right of freedom to worship or the manner of exercising this right is not prohibited by the statute. To be sure, the right is subject to reasonable regulation to the end that persons other than the appellants shall have equal right to worship God in a manner consistent with public order and public safety. The statute in question does not set up any religious tests nor has it in fact been administered unfairly in any way to deprive the appellants or anyone else of the reasonable use of the high-

ways in connection with the right of pedestrians to exercise their civil liberties.

The statute does not deny the appellants their right of freedom of speech and of the press but it does prohibit any persons from engaging in a parade or procession without giving the municipal authorities advance notice in order that they may prevent and guard against disorder and congestion of traffic. Neither the appellants nor any other group have an absolute unrestricted right to parade on public highways irrespective of the rights of other pedestrians to exercise a similar right. This Honorable Court in performing "the delicate and difficult task" of protectng civil rights on the one hand and the police power of the states on the other must take into consideration the necessity for some reasonable regulation of the sidewalks and highways in order that all users of the sidewalks and highways are granted equal rights.

The statute does not prohibit or unreasonably deprive the appellants or any other group of their right of assembly. It must be remembered that the appellants' rights under the due process clause of the Fourteenth Amendment to the United States Constitution are not absolute. This Honorable Court in its most recent decisions has reaffirmed the proposition that such rights must be exercised in subordination to the general comfort and convenience. If several groups should decide to use a given highway at the same time in opposite directions and the municipal authorities had no notice of such use, it is quite evident that disorder would result, probably followed by riot, and that the public peace and safety would be seriously jeopardized. This statute is designed to obviate such an occurrence and as construed and applied does not deprive the appellants or any other group of their right to peaceably assemble in and on public ways.

The statute in question requiring a permit for a parade or procession as construed and applied by the New Hampshire Supreme Court is reasonable, cannot be used discriminately, promotes the public good and cannot be used as a guise for regulating the opinions or principles of the appellants. It is significant that in the State of New Hampshire the appellants have never been subjected to unfair treatment or discrimination and, therefore, statutes or ordinances which have been struck down in other cases for that very reason are not pertinent or controlling in the instant case.

POINTS FOR ARGUMENT

POINT ONE.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS DOES NOT DEPRIVE THEM OF THEIR RIGHT OF FREEDOM TO WORSHIP GUARANTEED BY THE UNITED STATES CONSTITUTION.

POINT TWO.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS DOES NOT DEPRIVE THEM OF THEIR RIGHT OF FREEDOM OF SPEECH AND OF PRESS GUARANTEED BY THE UNITED STATES CONSTITUTION.

POINT THREE.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS DOES NOT DEPRIVE THEM OF THEIR RIGHT OF FREEDOM OF ASSEMBLY GUARANTEED BY THE UNITED STATES CONSTITUTION.

POINT FOUR.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS IS NOT UNREASONABLE, ARBITRARY OR DISCRIMINATORY AND DOES NOT DENY THE APPELLANTS EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE UNITED STATES CONSTITUTION.

POINT FIVE.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS IS NOT VAGUE AND INDEFINITE AND DOES NOT DENY THE APPELLANTS EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE UNITED STATES CONSTITUTION.

ARGUMENT.

POINT ONE.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS DOES NOT DEPRIVE THEM OF THEIR RIGHT OF FREEDOM TO WORSHIP GUARANTEED BY THE UNITED STATES CONSTITUTION.

It is elementary that the freedom of religious worship is and always has been subject to reasonable restrictions. Thus, the practice of bigamy or polygamy, even though actuated by sincere and religious beliefs, may be prohibited without violating the constitutional guaranty of religious liberty. *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333. Conduct pursued for religious purposes has been constitutionally prohibited and punished in many other instances. The refusal of one to be vaccinated

is subject to the state police power even though the refusal to submit to such a requirement is deemed violative of one's religious opinions and practices. *Jacobson* v. *Massachusetts,* 197 U. S. 11. The refusal of a person to take up arms to defend his country has been the subject of both prohibition and punishment. *United States* v. *MacIntosh,* 283 U. S. 605. The fact that a person is fired with religious zeal to parade or beat a drum has not prevented the state under its police power from regulating such activity in the interests of the public as a whole. *State* v. *White,* 64 N. H. 48. It has never been considered a defense to the crime of blasphemy that it was done pursuant to and in conformity with a supposed religious duty. *Muzzey* v. *Wilkins,* Smith (N. H.) 1.

The relative right of freedom of worship is well stated in the case of *State* v. *White,* 64 N. H. 48, 50 as follows:

> "Religious liberty, as recognized and secured by the Constitution, does not mean a license to engage in acts having a tendency to disturb the public peace under the form of religious worship, nor does it include the right to disregard those regulations which the legislature have deemed reasonably necessary for the security of public order. A reasonable measure of prevention to avoid disturbance is not an infringement of constitutional rights."

The power of the public authorities to require a flag salute in public schools may be distinguished from the facts of the instant case. However, *Minersville School District* v. *Gobitis,* 310 U. S. 586, 593 is pertinent as demonstrating the proposition that religious freedom is relative and not absolute. More specifically it demonstrates that the appellants' conception of religious duty conflicts "with the secular interests of his fellowmen." Appellee admits that the desire

to foster national unity may be of more fundamental importance than the desire to promote municipal peace and order but the difference is only one of degree. In neither case is religious freedom absolute and must of necessity be subject to regulation in the interests of public safety and public order. The New Hampshire legislature has in no way attempted to set out any religious tests by which participants in a parade shall be licensed. In New Hampshire, Jehovah's witnesses may hold such opinions as they wish and they may expound them in public without "previous restraint." cf. *Near* v. *Minnesota,* 283 U. S. 697, 713. By no stretch of the imagination can it be said that the statute is designed to regulate the appellants' religious views and it is apparent that the statute as construed and applied to the appellants is general and nondiscriminatory legislation applicable to all those who wish to use public ways.

The instant case is distinguishable from *Cantwell* v. *Connecticut,* 310 U. S. 296. In the *Cantwell* case the license was dependent on whether or not a state officer decided in his opinion that a certain cause was religious or charitable. Under the New Hampshire statute no such power is delegated to the municipal officers and it makes no difference whether the parade is for patriotic, religious, charitable or other purposes. It is submitted that the *Cantwell* case is authority for affirming the decision of the New Hampshire Supreme Court, as appears from the following quotation:

> "It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment to the

Constitution of the United States." *Cantwell* v. *Connecticut*, supra, p. 304.

To require Jehovah's witnesses to obtain a license for a parade or a procession or an "information march" is in the interests of public safety, peace, comfort, and convenience. The inconvenience to the appellants in such cases is insignificant compared with the necessity of promoting public order and preventing threats to public safety. The New Hampshire statute is not aimed at any group but as construed and applied, both in fact and in theory, is a general, reasonable and nondiscriminatory police regulation.

It is significant that the court below found nothing in the statute which could be considered a restraint on the free exercise of one's religious liberty. The Supreme Court of New Hampshire said:

> "It would seem a play of imagination to find in the statute any purpose to restrain the freedom of religion, or its exercise through speech or writing." *State* v. *Cox*, 16 A. (2d) 508, 516; (R. 250).

In other words, the court below followed the doctrine set forth in *Minersville School District* v. *Gobitis*, supra, p. 594, 595, that conscientious scruples do not excuse individuals from complying with a general law "not aimed at the promotion or restriction of religious beliefs." The power and duty of the state under its police power to enact and enforce police regulations of general application which are not directed against any sect or creed and which are a reasonable and proper means toward conserving public peace will be upheld even against the appellants. This is so although the appellants may believe that the observance of such police regulations by them is "an insult to Almighty God." See Cardozo, J., in *Hamilton* v. *Regents*, 293 U. S. 245, 268.

The statute in question as construed and applied is a fair, uniform, reasonable and nondiscriminatory regulation, constitutionally enacted and enforced in the furtherance of public order and safety. As such it is not subject to constitutional attack under any decision of this Honorable Court..

POINT TWO.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS DOES NOT DEPRIVE THEM OF THEIR RIGHT OF FREEDOM OF SPEECH AND OF PRESS GUARANTEED BY THE UNITED STATES CONSTITUTION.

The statute as construed and applied by the Supreme Court of New Hampshire does not conflict with the due process clause of the federal Constitution. The thought is well stated in the opinion below:

> "The language of the statute discloses no purpose to impose a 'previous restraint' upon freedom of the press or of speech as in Lovell v. Griffin; Schneider v. State; Thornhill v. Alabama and Carlson v. California, supra, nor to hamper freedom of assembly as in Hague v. Committee for Industrial Organization, supra. No censorship of comments on matters of public concern, to which reference is made in the Thornhill case, is authorized or threatened and a fortiori no censorship of religion is contemplated as in Cantwell v. Connecticut, supra." *State* v. *Cox*, 16 A. (2d) 508, 516: (R. 248, 249).

Three of the ordinances which were held invalid in *Schneider* v. *State*, 308 U. S. 147, absolutely prohibited the distribution of handbills and printed matter on the public

streets. The statute in question makes no attempt to regulate the distribution of printed matter on the public streets and even if it were construed to include such distribution, it is obvious that the statute contains no prohibition. The fourth ordinance which was held invalid in the *Schneider* case was struck down because it allowed a police officer to substitute his own judgment as to the applicant's good character and the type of literature he was to distribute. Furthermore, the ordinance required the applicant to "undergo a burdensome and inquisitorial examination, including photographing and fingerprinting." supra, pp. 163, 164.

The statute involved in this case is not burdensome, does not require photographing, fingerprinting nor is the granting of the license made dependent upon the purpose for which the parade is to be held. In other words, administrative censorship is not a vice inherent in the New Hampshire statute and thus is not subject to the same condemnation as was warranted in the *Schneider* case.

Appellants rely upon *Lovell* v. *City of Griffin*, 303 U. S. 444. That case is distinguishable on several grounds. In the first place the ordinance in the *Lovell* case prohibited the distribution of literature and no such prohibition is found in the New Hampshire statute. Secondly, the prohibition contained in the ordinance was applicable not only to distribution of literature within the streets but extended to anywhere within the city limits. Thirdly, the ordinance as construed by the court gave the licensing authority unlimited discretion, unconfined by any defined standards. In the instant case the statute as construed by the Supreme Court of the State of New Hampshire is subject to the standard of reasonableness and excludes any possibility of discrimination in its administration. That the discretion of the licensing authorities under the New Hampshire statute

was constitutionally channelized is evident from the opinion itself:

> "The discretion thus vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate." *State* v. *Cox*, 16 A. (2d) 508, 513; (R. 244).

It is thus apparent that the New Hampshire statute, as construed by the Supreme Court of that state, adequately protects the appellants' rights of freedom of speech and freedom of press guaranteed by the due process clause. See, *Coleman* v. *City of Griffin*, 302 U. S. 636.

The appellee readily admits the commendable and general rule that statutes absolutely prohibiting peaceful picketing are unconstitutional. 125 A. L. R. 963; 130 A. L. R. 1303. In recent cases decided by this Honorable Court peaceful picketing has been considered one of the paramount and fundamental rights which are protected by the due process clause. *Thornhill* v. *State of Alabama*, 310 U. S. 88; *Carlson* v. *State of California*, 310 U. S. 106. These cases are distinguishable from the instant case in several particulars. In the instant case the statute does not prohibit or regulate peaceful picketing in connection with a labor dispute as was the situation in the above noted cases. In both these cases, it is noted that the ordinance or statute was discriminatory and was unfairly directed against certain pickets in its enforcement. While this fact was not material to the result reached in either of these cases, it was significantly mentioned as an example of how an inexact ordinance or statute

may jeopardize the freedom of speech and of press. The New Hampshire statute as construed and applied by the court involves "no censorship of comments on matters of public concern, to which reference is made in the *Thornhill* case. . . " *State* v. *Cox*, 16 A. (2d) 508, 516; (R. 249). Freedom of speech and freedom of press under the New Hampshire statute is subject to no "previous restraint," (*Near* v. *Minnesota*, supra) and does not threaten the exercise of free speech and free press.

It is the position of the appellee that the privilege of the appellants to disseminate their ideas and ideals orally or in writing is nevertheless subject to some reasonable and uniform control. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, B & Q R Co.* v. *Maguire*, 219 U. S. 549, 567. This court has been careful to point out in both the *Thornhill* case and the *Carlson* case that "the power to take adequate steps to preserve the peace and protect the privacy, the lives and the property of its residents cannot be doubted." *Thornhill* v. *Alabama*, supra, p. 105; *Carlson* v. *California*, supra, p. 113.

The most recent decisions of this Honorable Court affirm the constitutional right of peaceful picketing on the one hand (No. 56, *A. F. of L.* v. *Swing*, October Term, 1940, [U. S.] decided February 10, 1941), and reaffirm the right of the state under its police power to prohibit violence, disorder and interference with public safety on the other. No. 1, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, October Term, 1940 (U. S.), decided February 10, 1941. In the latter case, both in the majority and minority opinions, the right of a state to promote and maintain public order and safety was specifically emphasized.

The New Hampshire statute is not attempting nor does its enforcement indicate that it has attempted to prohibit the enjoyment of civil rights under the guise of regulating parades on its highways. Peaceful picketing by appropriate means involving a few people and creating no threat to order are clearly distinguishable from the regulation of parades which, as in this case, resulted in interference with vehicular traffic and pedestrians. The New Hampshire statute is not regulating peaceful picketing. It does not prohibit the distribution or circulation of handbills. The cases cited, therefore, are not authority against its constitutionality.

It is respectfully submitted that Jehovah's witnesses are not denied freedom of speech and freedom of press because the statute in question is a reasonable police regulation which imposes no substantial burden upon the freedom of speech or the freedom of press. cf. No. 3630, *City of Manchester* v. *Leiby*, October Term 1940 (C. C. A. 1) decided February 17, 1941, in which an ordinance of the City of Manchester, New Hampshire, requiring a badge from the superintendent of schools to sell or expose for sale literature, withstood constitutional attack. The court upheld the ordinance as applied to Jehovah's witnesses, even though they contended it violated freedom of speech, freedom of press and the right to worship God according to their own dictates. The decision is important as showing that reasonable ordinances or statutes do not run counter to recent decisions of this court, where they are general, nondiscriminatory and impose no substantial burden in the exercise of one's civil liberties.

POINT THREE

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS DOES NOT DEPRIVE THEM OF THEIR RIGHT OF FREEDOM OF ASSEMBLY GUARANTEED BY THE UNITED STATES CONSTITUTION.

The court below ruled that the statute in question which required a license for parades did not "hamper freedom of assembly as in Hague v. Committee for Industrial Organization, . . Neither is there any basis in the present case for a claim of administrative discrimination against these defendants or the religious group of which they are members by the officers charged with the enforcement of the act, analogous to that which was found to exist in the Hague case, supra." *State* v. *Cox,* 16 A. (2d) 508, 516; (R. 249). At the outset it is obvious that the New Hampshire court in its authoritative construction of its own laws ruled that freedom of assembly was not hampered and that in fact and in theory the appellants had not been subjected to unfair or discriminatory treatment in the enforcement of the ordinance. It is thus apparent that the *Hague* case, upon which the appellants rely, is clearly distinguishable from this case. Furthermore, as pointed out by the Supreme Court of New Hampshire, if a parade may be regarded as an assembly in motion, the right to engage in such an assembly is "not absolute, but relative and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order. *Hague* v. *C. I. O.*, 307 U. S. 496, 516. See, *State* v. *Cox,* 16 A. (2d) 508, 516; (R. 249-250).

The right to engage in a parade or participate in a public assembly has traditionally been subject to reasonable regulation. *Wilson* v. *Eureka City,* 173 U. S. 32; *People ex rel. Doyle* v. *Atwell,* 232 N. Y. 96, error dismissed 261 U. S. 590; *Davis* v. *Massachusetts,* 167 U. S. 43.

The right of states and municipalities to regulate the use of streets and public places is clearly indicated in *Schneider* v. *Irvington,* 308 U. S. 147, wherein the Court said:

> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets."

In the instant case the appellants paraded "in the middle of the crowded street." (R. 47). This was "contrary to traffic regulations" inasmuch as the statute in question is designed to control traffic in the streets and highways of the State. Furthermore, the action of the appellants, although it did not result in the stoppage of all traffic, did result in considerable interference with pedestrians who were forced to step aside. (R. 68). It is, therefore, the contention of the appellee that "prohibition of such conduct would not abridge the constitutional liberty . . ."

In the next to the last paragraph of *Schneider* case, the Court was careful to reserve and safeguard The State's protective power when it said: "Doubtless there are other features of such activities which may be regulated in the public interest without prior license or other invasion of constitutional liberty." The New Hampshire statute has not been construed as giving the licensing authorities "unlimited discretion in controlling free assembly." As a matter of fact, the statute is not directed against Jehovah's Witnesses who wish to exercise free speech and free assembly, but is directed against all applicants to the end that

one group or person will exercise his constitutional rights in an orderly and appropriate way by appropriate means.

As heretofore demonstrated, the *Thornhill* case and the *Carlson* case do not militate against the conclusions already advanced. Even Jehovah's Witnesses would not be allowed to picket en masse to the stoppage of traffic and without regard for the rights of other pedestrians under the doctrine of the *Thornhill* and *Carlson* cases. The necessity for requiring a license to engage in a parade or procession is forcefully demonstrated by the court below.

> "Application for a permit gives the public authorities notice in advance of any parade or procession for which license may be granted, thus giving opportunity for its proper policing. And the license, in fixing the time and place of a parade or procession, serves to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." *State* v. *Cox*, 16 A. (2d) 508, 514; (R. 245).

It does not require extended argument to demonstrate that licenses for parades and processions are prerequisites of public order, avoidance of congestion and a proper and fair adjustment of the different kinds and types of travel of the public as a whole.

The solicitation for civil liberties evidenced in recent cases is "necessarily limited to situations where the police regulation could be effectively achieved without limiting these liberties." 53 *Harv. L. R.* 487, 488 (1940). The state respectfully submits that Jehovah's Witnesses' right to engage in a parade, procession or "information march" is necessarily subject to the restriction that all other groups or persons in Manchester are likewise entitled to the free passage of its streets and sidewalks.

It is respectfully submitted that *Davis* v. *Massachusetts*, 167 U. S. 43, although distinguished, has never been overruled and the general principle stated in that case and in the *Hague* case that the state has a right to promote public order and prevent public disorder is as true today as it was in 1897. On this record the appellants' right of assembly has not been violated or unconstitutionally invaded.

POINT FOUR

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS IS NOT UNREASONABLE, ARBITRARY OR DISCRIMINATORY AND DOES NOT DENY THE APPELLANTS EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE UNITED STATES CONSTITUTION.

Argument under this point is combined with argument under point five, infra, inasmuch as both points involve the same principles of law and can be discussed together.

POINT FIVE

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANTS IS NOT VAGUE AND INDEFINITE AND DOES NOT DENY THE APPELLANTS EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE UNITED STATES CONSTITUTION.

In considering the New Hampshire statute requiring a license for a parade, great weight must be given to the authoritative construction placed upon the act by the court of last resort in New Hampshire. The statute as construed by the Supreme Court of New Hampshire does not involve any undue delegation of legislative power, is not subject to the vice of unconfined discretion in the licensing authorities

and by "necessary inference," convenience in the use of the streets is made the standard of official action. This is forcefully and succinctly stated in the opinion of the Supreme Court of New Hampshire as follows:

> "Also, the act is implicit in its requirement that the licensing authority act reasonably in granting or denying licenses, and with reference to the object of public order on the public ways. If it does not in express terms 'make comfort or convenience in the use of the streets * * * the standard of official action' (Hague v. Committee &c. 307 (fol. 244) U. S. 496, 516), the necessary inference is that it does, based upon the presumption in favor of the validity of legislation as reenforced by the express provision of the act bestowing 'delegated powers' upon the authority, as a grant intended to be only of due legislative power which may properly be delegated. The discretion thus vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations, and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has, and the legislature attempted to delegate no power it did not possess." *State* v. *Cox*, 16 A. (2d) 508, 513. (R. 244).

The appellants rely on *Hague* v. *C. I. O.*, supra, as authority for striking down the statute in question as void on its face. In view of the construction placed upon it by the

court below, it logically follows that an adequate standard is set up under the statute as judicially construed. The *Hague* case is, therefore, distinguishable from the instant case.

Although perhaps not material, it is significant that the constant and continual abuse of civil liberties in the *Hague* case has no counterpart in New Hampshire. Administrative unfairness in the enforcement of the statute is not a complaint that the appellants or anyone else can make in this case. The act upon its face and as judicially construed does not control or suppress publication of ideas orally or in writing. Communication by the distribution of leaflets is in no way regulated by the statute. The New Hampshire law regulates parades and processions on the highways. It is not a regulation or an attempted regulation of speech, press or assembly. *State* v. *Cox,* 16 A. (2d) 508, 514; (R. 246).

It is submited that the New Hampshire statute guarantees to the appellants equal protection of the laws and prescribes no arbitrary or discriminatory conditions upon which a license from the municipal authorities shall issue. As such it is a valid exercise of the state's police power in the interests of public order and public safety. No. 3630 *City of Manchester* v. *Leiby,* October Term, 1940 (C. C. A. 1) decided February 17, 1941. See also, the recent decision of this Honorable Court in No. 716 *Hussock* v. *People of New York,* October Term, 1940, decided March 3, 1941.

CONCLUSION.

For the reasons hereinbefore discussed the judgment of the New Hampshire Supreme Court affirming the conviction of the appellants should be affirmed and the appeal dismissed.

Respectfully submitted,

Frank R. Kenison
Attorney General of the
State of New Hampshire

J. Vincent Broderick
County Solicitor
Attorneys for Appellee.

Jeremy R. Waldron
of Counsel

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SUPREME COURT OF THE UNITED STATES.

No. 502.—October Term, 1940

Willis Cox, Walter Chaplinsky, John Konides, et al., Appellants, *vs.* State of New Hampshire. } Appeal from the Supreme Court of the State of New Hampshire.

[March 31, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellants are five "Jehovah's Witnesses" who, with sixty-three others of the same persuasion, were convicted in the municipal court of Manchester, New Hampshire, for violation of a state statute prohibiting a "parade or procession" upon a public street without a special license.

Upon appeal, there was a trial *de novo* of these appellants before a jury in the Superior Court, the other defendants having agreed to abide by the final decision in that proceeding. Appellants were found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. *State* v. *Cox*, 90 N. H. —.

By motions and exceptions, appellants raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it deprived appellants of their rights of freedom of worship, freedom of speech and press, and freedom of assembly, vested unreasonable and unlimited arbitrary and discriminatory powers in the licensing authority, and was vague and indefinite. These contentions were overruled and the case comes here on appeal.

The statutory prohibition is as follows (New Hampshire, P. L., Chap. 145, Sec. 2):

"No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall

first be obtained from the selectmen of the town, or from a licensing committee for cities hereinafter provided for".

The provisions for licensing are set forth in the margin.[1]

The facts, which are conceded by the appellants to be established by the evidence, are these: The sixty-eight defendants and twenty other persons met at a hall in the City of Manchester on the evening of Saturday, July 8, 1939, "for the purpose of engaging in an information march". The company was divided into four or five groups, each with about fifteen to twenty persons. Each group then proceeded to a different part of the business district of the city and there "would line up in single-file formation and then proceed to march along the sidewalk, 'single-file', that is, following one another". Each of the defendants carried a small staff with a sign reading "Religion is a Snare and a Racket" and on the reverse "Serve God and Christ the King". Some of the marchers carried placards bearing the statement "Fascism or Freedom. Hear Judge Rutherford and Face the Facts". The marchers also handed out printed leaflets announcing a meeting to be held at a later time in the hall from which they had started, where a talk on government would be given to the public free of charge. Defendants did not apply for a permit and none was issued.

There was a dispute in the evidence as to the distance between the marchers. Defendants said that they were from fifteen to twenty feet apart. The State insists that the evidence clearly showed that the "marchers were as close together as it was possible for them to

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[1] New Hampshire, P. L., Chap. 145, Sections 3, 4 and 5 are as follows:

"Section 3: Licensing Board. Any city may create a licensing board to consist of the person who is the active head of the police department, the mayor of such city and one other person who shall be appointed by the city government, which board shall have delegated powers to investigate and decide the question of granting licenses under this chapter, and it may grant revocable blanket licenses to fraternal and other like organizations, to theatres and to undertakers.

"Section 4: Licenses: Fees. Every such special license shall be in writing, and shall specify the day and hour of the permit to perform or exhibit or of such parade, procession or open-air public meeting. Every licensee shall pay in advance for such license, for the use of the city or town, a sum not more than three hundred dollars for each day such licensee shall perform or exhibit, or such parade, procession or open-air public meeting shall take place; but the fee for a license to exhibit in any hall shall not exceed fifty dollars.

"Section 5: Penalty. If any person shall violate the provisions of the preceding sections he shall be fined not more than five hundred dollars; and it shall be the duty of the selectmen to prosecute for every violation of this chapter".

walk". Appellants concede that this dispute is not material to the questions presented. The recital of facts which prefaced the opinion of the state court thus summarizes the effect of the march: "Manchester had a population of over 75,000 in 1930, and there was testimony that on Saturday nights in an hour's time 26,000 persons passed one of the intersections where the defendants marched. The marchers interfered with the normal sidewalk travel, but no technical breach of the peace occurred. The march was a prearranged affair, and no permit for it was sought, although the defendants understood that under the statute one was required".

Appellants urge that each of the defendants was a minister ordained to preach the gospel in accordance with his belief and that the participation of these ministers in the march was for the purpose of disseminating information in the public interest and was one of their ways of worship.

The sole charge against appellants was that they were "taking part in a parade or procession" on public streets without a permit as the statute required. They were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any one of these things apart from engaging in a "parade or procession" upon a public street is not here involved and the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us.

There appears to be no ground for challenging the ruling of the state court that appellants were in fact engaged in a parade or procession upon the public streets. As the state court observed: "It was a march in formation, and its advertising and informatory purpose did not make it otherwise. . . . It is immaterial that its tactics were few and simple. It is enough that it proceeded in an ordered and close file as a collective body of persons on the city streets".

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as incon-

sistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places. *Lovell* v. *Griffin,* 303 U. S. 444, 451; *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 515, 516; *Schneider* v. *State,* 308 U. S. 147, 160; *Cantwell* v. *Connecticut,* 310 U. S. 296, 306, 307.

In the instant case, we are aided by the opinion of the Supreme Court of the State which construed the statute and defined the limitations of the authority conferred for the granting of licenses for parades and processions. The court observed that if the clause of the Act requiring a license "for all open-air public meetings upon land contiguous to a highway" was invalid, that invalidity did not nullify the Act in its application to the other situations described. Recognizing the importance of the civil liberties invoked by appellants, the court thought it significant that the statute prescribed "no measures for controlling or suppressing the publication on the highways of facts and opinions either by speech or by writing"; that communication "by the distribution of literature or by the display of placards and signs" was in no respect regulated by the statute; that the regulation with respect to parades and processions was applicable only "to organized formations of persons using the highways"; and that "the defendants, separately, or collectively in groups not constituting a parade or procession", were "under no contemplation of the Act". In this light, the court thought that interference with liberty of speech

and writing seemed slight; that the distribution of pamphlets and folders by the groups "traveling in unorganized fashion" would have had as large a circulation, and that "signs carried by members of the groups not in marching formation would have been as conspicuous, as published by them while in parade or procession".

It was with this view of the limited objective of the statute that the state court considered and defined the duty of the licensing authority and the rights of the appellants to a license for their parade, with regard only to considerations of time, place and manner so as to conserve the public convenience The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the court further observed that, in fixing time and place, the license served "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder". But the court held that the licensing board was not vested with arbitrary power or an unfettered discretion; that its discretion must be exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination"; that a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate". The defendants, said the court, "had a right, under the Act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such condition or changes in time, place and manner as would avoid disturbance".

If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.

There remains the question of license fees which, as the court said, had a permissible range from $300 to a nominal amount. The court construed the Act as requiring "a reasonable fixing of the

amount of the fee". "The charge", said the court, "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession, to which the charge would be adjusted". The fee was held to be "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed". There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

There is no evidence that the statute has been administered otherwise than in the fair and non-discriminatory manner which the state court has construed it to require.

The decisions upon which appellants rely are not applicable. In *Lovell* v. *Griffin, supra,* the ordinance prohibited the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship. In *Hague* v. *Committee for Industrial Organization, supra,* the ordinance dealt with the exercise of the right of assembly for the purpose of communicating views; it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent "riots, disturbances or disorderly assemblage". The ordinance thus created, as the record disclosed, an instrument of arbitrary suppression of opinions on public questions. The court said that "uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right". In *Schneider* v. *State, supra* (p. 163) the ordinance was directed at canvassing and banned unlicensed communication of any views, or the advocacy of any cause, from door to door, subject only the power of a police officer to determine as a censor what literature might be distributed and who might dis-

tribute it. In *Cantwell* v. *Connecticut, supra* (p. 305) the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion.

Nor is any question of peaceful picketing here involved, as in *Thornhill* v. *Alabama,* 310 U. S. 88, and *Carlson* v. *California,* 310 U. S. 106. The statute, as the state court said, is not aimed at any restraint of freedom of speech, and there is no basis for an assumption that it would be applied so as to prevent peaceful picketing as described in the cases cited.

The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.

The judgment of the Supreme Court of New Hampshire is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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